

MAY 4 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

---

DR. IRVING RUST, on behalf of himself, his patients and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

*Petitioners,*

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States  
Department of Health and Human Services,

*Respondent.*

---

THE STATE OF NEW YORK, THE CITY OF NEW YORK,  
THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

*Petitioners,*

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States  
Department of Health and Human Services,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**BRIEF OF AMICUS CURIAE THE AMERICAN  
PUBLIC HEALTH ASSOCIATION,  
NOW LEGAL DEFENSE AND EDUCATION FUND, et al.  
IN SUPPORT OF THE PETITIONS**

---

---

(LIST OF AMICI CONTINUE ON NEXT PAGE)

---

---

**AMICI CURIAE**

*Of Counsel:*

Nadine Taub  
Rutgers University  
School of Law  
15 Washington Street  
Newark, New Jersey 07102

Sarah E. Burns, Legal Director  
NOW Legal Defense and  
Education Fund  
99 Hudson Street  
12th Floor  
New York, New York 10013

John H. Hall  
*Counsel of Record*  
Geoffrey H. Coll  
Randi J. Roberts  
Debevoise & Plimpton  
875 Third Avenue  
New York, New York 10022  
(212) 909-6000

Attorneys for *Amici Curiae*

The American Association of  
University Women  
American Ethical Union  
American Humanist Association  
American Jewish Committee  
American Jewish Congress  
American Medical Women's  
Association, Inc.  
American Nurses' Association  
Americans for Religious Liberty  
Asian American Legal Defense and  
Education Fund  
The Association of Reproductive  
Health Professionals  
The Association for Women in  
Psychology  
Boston Women's Health Book  
Collective  
The California Coalition of Nurse  
Practitioners  
Catholics for a Free Choice  
Center for Population and Family  
Health, Columbia University  
The Coalition of Labor Union Women  
Comision Femenil Mexicana Nacional,  
Inc.  
Connecticut Women's Education and  
Legal Fund, Inc.  
The Coordinating Center for Women  
in Church and Society  
Equal Rights Advocates, Inc.  
Family Planning Advocates of New  
York State  
Lambda Legal Defense & Education  
Fund, Inc.  
The League of Women Voters of the  
United States  
The Lymphoma Foundation of  
America  
Madelyn Miller, CSW ACSW  
NAACOG: The Organization for  
Obstetric, Gynecologic, and  
Neonatal Nurses

The National Abortion Rights Action  
League  
The National Association of Nurse  
Practitioners in Reproductive Health  
The National Center for Lesbian  
Rights  
The National Council of Jewish  
Women  
The National Federation of Temple  
Sisterhoods—District 3  
The National Law Center on  
Homelessness and Poverty  
The National Lawyers Guild  
The National Woman's Party  
The National Women's Conference  
Committee  
The National Women's Health  
Network  
The National Women's Law Center  
National Women's Political Caucus  
New Jewish Agenda  
New York State Republican Family  
Committee  
Northwest Women's Law Center  
Puerto Rican Legal Defense and  
Education Fund  
Religious Coalition for Abortion  
Rights  
Professor Deborah L. Rhode  
(Stanford Law School)  
Professor Barbara Katz Rothman  
(Sociology Dept., Baruch College)  
Sex Information and Education  
Council of the United States  
The Southern California Women's  
Law Center  
The Wisconsin Nurse Practitioners in  
Reproductive Health  
Women's Equal Rights Legal Defense  
and Education Fund  
The Women's Law Center, Inc.  
The Women's Law Project  
The Women's Legal Defense Fund  
The YWCA of the U.S.A.

## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
REASONS FOR GRANTING THE WRIT .....	3
I. THE DECISION BELOW RAISES ISSUES OF CRITICAL NATIONAL IMPORTANCE BECAUSE THE REGULATIONS AT ISSUE JEOPARDIZE THE HEALTH OF WOMEN, INTERFERE WITH THE INTEGRITY OF THE PHYSICIAN-PATIENT RELATION- SHIP AND SEVERELY DIMINISH THE AVAILABILITY OF QUALITY HEALTH CARE FOR LOW-INCOME WOMEN .....	3
A. Section 59.8's Prohibition of Abortion Counseling and Referral Jeopardizes the Health of Women Served by Title X Clinics.....	4
B. Section 59.8 of the Regulations Interferes with the Integrity of the Physician-Patient Relationship by Forcing Physicians to Depart from their Professional Code of Ethics, Preventing Them from Exercising Their Best Judgment and Exposing Them to Liability for Malpractice.....	10
C. The Regulations Will Engender a Two- Tiered System of Health Care by Severely Diminishing the Availability of Quality Family Planning Services for Low-Income Women.....	14

## PAGE

II. THE DECISION BELOW CONTRAVENES RULINGS OF THIS COURT THAT PROTECT THE PHYSICIAN-PATIENT DIALOGUE REGARDING A WOMAN'S DECISION TO TERMINATE HER PREGNANCY .....	16
CONCLUSION .....	20

## TABLE OF AUTHORITIES

Cases	PAGE
<i>Becker v. Schwartz</i> , 46 N.Y.2d 401, 386 N.E.2d 807 (N.Y. 1978).....	14
<i>Berman v. Allen</i> , 8 N.J. 421, 404 A.2d 8 (N.J. 1979)	14
<i>Cammarano v. United States</i> , 358 U.S. 498 (1959) ...	19
<i>Canterbury v. Spence</i> , 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972) .....	10
<i>City of Akron v. Akron Center for Reproductive Health Inc.</i> , 462 U.S. 416 (1983) .....	10, 17
<i>Cornelius v. NAACP Legal Defense and Education Fund, Inc.</i> , 473 U.S. 788 (1985) .....	19
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973).....	17
<i>Goldberg v. Ruskin</i> , 128 Ill. App. 3d 1029, 471 N.E.2d 530 (Ill. App. Ct. 1984), aff'd, 113 Ill. 2d 482, 499 N.E.2d 406 (Ill. 1986) .....	13
<i>Harris v. McRae</i> , 448 U.S. 297, reh. den., 448 U.S. 917 (1980).....	16, 19
<i>Lindquist v. Dengel</i> , 92 Wash. 2d 257, 595 P.2d 934 (Wash. 1979).....	14
<i>Maher v. Roe</i> , 432 U.S. 464 (1977).....	17, 19
<i>Manion v. Tweedy</i> , 257 Minn. 59, 100 N.W.2d 124 (Minn. 1959).....	14
<i>Massachusetts v. Secretary of Health and Human Services</i> , No. 88-1279, slip. op. (1st Cir. March 19, 1990) .....	<i>passim</i>

	PAGE
<i>New York v. Sullivan</i> , 889 F.2d 401 (2d Cir. 1989) .....	17
<i>Perry v. Sinderman</i> , 408 U.S. 593 (1972).....	17
<i>Phillips v. United States</i> , 508 F. Supp. 544 (D.S.C. 1981).....	13
<i>Poe v. Ullman</i> , 367 U.S. 497 <i>reh'g denied</i> , 368 U.S. 869 (1961) .....	19
<i>Regan v. Taxation with Representation of Wash.</i> , 461 U.S. 540 (1983) .....	19
<i>Robak v. United States</i> , 658 F.2d 471 (7th Cir. 1981)	13
<i>Roe v. Wade</i> , 410 U.S. 113, <i>reh'g denied</i> , 410 U.S. 959 (1973).....	17
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	17
<i>Smith v. Cote</i> , 128 N.H. 231, 513 A.2d 341 (N.H. 1986).....	14
<i>Speiser v. Randall</i> , 357 U.S. 513 <i>reh'g denied</i> , 358 U.S. 860 (1958) .....	17
<i>Steele v. United States</i> , 463 F. Supp. 330 (D. Alaska 1977).....	14
<i>Thomas v. Review Board of the Indiana Employment Security Division</i> , 450 U.S. 707(1981) .....	17
<i>Thornburgh v. American College of Obstetricians and Gynecologists</i> , 476 U.S. 747 (1986) .....	10, 18
<i>Webster v. Reproductive Health Services</i> , 109 S. Ct. 3040 (1989).....	16, 17

	PAGE
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977).....	17
<b>Federal Statutes, Regulations and Guidelines</b>	
42 C.F.R. §§ 59.1 <i>et. seq.</i> (1989).....	<i>passim</i>
United States Department of Health and Human Services, <i>Program Guidelines for Project Grants for Family Planning Services</i> § 9.4 (1981) .....	15
<b>Other Authority</b>	
American Academy of Pediatrics, Committee on Adolescence, <i>Counseling the Adolescent About Pregnancy Options</i> , 83 Pediatrics 135 (Jan. 1989) .....	6
American College of Obstetricians and Gynecologists, <i>Standards for Obstetric—Gynecologic Services</i> (6th ed. 1985) .....	6, 11
American College of Obstetricians and Gynecologists, "Statement of Policy: Further Ethical Considerations in Induced Abortion" (Dec. 1977).....	11
American Medical Association, <i>Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association</i> (1989).....	10, 11, 12
Andrews, <i>Informed Consent Statutes and the Decision-making Process</i> , 5 J. of Legal Medicine 163 (1984).	13
<i>Clinical Obstetrics</i> (C. Pauerstein ed. 1987) .....	7
S. Elias & G. Annas, <i>Reproductive Genetics and the Law</i> (1977) .....	14
Forrest, <i>The Delivery of Family Planning Services in the United States</i> , 20 Fam. Plan. Persp. 91 (1988) .	15

## PAGE

Fort, Morrison, Berreras, Diggs & Fish, <i>Counseling the Patient With Sickle Cell Disease About Reproduction: Pregnancy Outcome Does Not Justify the Maternal Risk</i> , 111 Am. J. of Obstetrics and Gynecology 324 (Sep.-Dec. 1971) .....	8
<i>Genetics in Obstetrics and Gynecology</i> (Simpson ed. 1982).....	9
Katz, <i>Physician-Patient Encounters "On a Darkling Plain,"</i> 9 W. New Eng. L. Rev. 207 (1987) .....	5
<i>Maternal-Fetal Medicine</i> (R. Creasey & R. Resnik 2d ed. 1989) .....	7, 8
<i>Medical Complications During Pregnancy</i> (G. Burrow & T. Ferris 3d ed. 1988).....	7
Minkoff, <i>Care of Pregnant Women Infected With Human Immunodeficiency Virus</i> , 258 J. of Am. Med. Ass'n 2714 (1974).....	8
Note, <i>The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?</i> , 41 Stan. L. Rev. 401 (1989).....	3
N.Y. Times, Jan. 8, 1990 at A1, col. 1 .....	5
<i>Obstetrics &amp; Gynecology</i> (D. Danforth & J. Scott 5th ed. 1986) .....	8
President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, <i>Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship</i> (1982).....	12, 13
Williams & Britan, <i>Cancer and Pregnancy</i> , 12 Clin. Perinatology 609 (1985).....	8

## PAGE

Williams <i>Obstetrics</i> (J. Pritchard, P. MacDonald & N. Grant 17th ed. 1985) .....	7, 8
--	------

## INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of 53 individuals and organizations, including associations of health care professionals dedicated to the advancement of public health across the United States and not-for-profit organizations committed to improving the health and circumstances of women. These organizations, which represent thousands of women and men, including patients, physicians and other health care professionals, have joined together to urge this Court to grant the writ sought by Petitioners Dr. Irving Rust, *et al.* (89-1391) and the State of New York, *et al.* (89-1392).

This case presents issues of critical national importance because implementation of the Title X regulations at issue will have a devastating impact throughout the country on the health of women seeking medical advice and care at family planning clinics receiving Title X funds. By censoring counseling and referrals regarding abortion, the regulations jeopardize not only the quality of health care provided at Title X-funded clinics but also their pregnant patients' constitutionally-protected right to decide, in consultation with a qualified physician, whether or not to terminate a pregnancy.

The American Public Health Association<sup>1</sup> and other *amici* organizations and individuals dedicated to the advancement of public health in the United States are particularly concerned that, by depriving women of necessary information and services and assaulting the integrity of the physician-patient relationship, the regulations will create a health crisis for women served by Title X family planning clinics.

NOW Legal Defense and Education Fund and other *amici* organizations and individuals committed to improving the condition of women are particularly concerned that the regulations unduly interfere with the fundamental right to reproductive choice essential to the health and lives of women

---

<sup>1</sup> The American Public Health Association is a plaintiff-appellee in *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279, slip. op. (1st Cir. March 19, 1990).

using Title X-funded clinics. (Further statements of interest of *amici* are set forth at Appendix A.)

*Amici* have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court.

### SUMMARY OF ARGUMENT

This Court should grant the writ sought by Petitioners. The decision below raises issues of grave national importance because the regulations at issue jeopardize the health of women, interfere with the integrity of the physician-patient relationship and severely diminish the availability of quality health care for low-income women. In addition, the decision below conflicts with rulings of this Court that protect from undue governmental influence and distortion the physician-patient dialogue regarding a woman's decision to terminate her pregnancy.

*Amici* rely on the Statement of the Case set forth in the Petitions. *Amici* also support and will not reiterate the arguments set forth in the Petitions and Supplements to the Petitions for Writ of Certiorari regarding the separation requirement's impermissible burden on speech, the Secretary's lack of authority to promulgate the challenged regulations and the existence of conflict between the circuits.

The organizations of health care professionals and women that have joined together as *amici* are uniquely qualified to address the effect of the regulations on women served by Title X programs, doctors and other health care professionals who work in Title X programs, and the quality of care at family planning clinics that receive Title X funds. *Amici* submit this brief to focus this Court's attention on the uncontested evidence ignored by the Court of Appeals for the Second Circuit that demonstrates the severe harm the regulations will inflict on the communities served by Title X family planning clinics.

### REASONS FOR GRANTING THE WRIT

#### I. THE DECISION BELOW RAISES ISSUES OF CRITICAL NATIONAL IMPORTANCE BECAUSE THE REGULATIONS AT ISSUE JEOPARDIZE THE HEALTH OF WOMEN, INTERFERE WITH THE INTEGRITY OF THE PHYSICIAN-PATIENT RELATIONSHIP AND SEVERELY DIMINISH THE AVAILABILITY OF QUALITY HEALTH CARE FOR LOW-INCOME WOMEN.

Title X is the primary source of federal support for family planning and reproductive health services, funding over 3,900 clinics nationwide and serving nearly five million low-income women per year.<sup>2</sup> Because section 59.8 of the regulations at issue in this case prohibits abortion counseling and referral and requires referral for prenatal care, the millions of low-income pregnant women served by Title X clinics will receive incomplete and biased medical advice. Section 59.8 forbids health care professionals in all these programs from informing their patients of the availability of abortion, and even from telling them where they can get abortion-related information. See 42 C.F.R. § 59.8(a)(1) (1989). Irrespective of the patient's medical condition, personal wishes and needs, the regulations absolutely prohibit professionals in Title X programs from providing any abortion counseling or referral. See 42 C.F.R. §§ 59.8(a)(4) (1989). Even when women request information about abortion, the clinic may only tell them that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5) (1989).

At the same time that they require abortion-related information to be withheld, the regulations also compel Title X programs to provide a pregnant woman with a list of prenatal care providers "that promote the welfare of mother and

---

<sup>2</sup> Title X served 4.3 million low-income women in 1988. The Title X target population consists of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19. Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 Stan. L. Rev. 401, 408 (1989).

unborn child." 42 C.F.R. § 59.8(a)(2) (1989).<sup>3</sup> This referral list must include all prenatal care providers that do not perform abortions and it cannot include providers that offer abortion as their "principal business." 42 C.F.R. § 59.8(a)(3) (1989).

**A. Section 59.8's Prohibition of Abortion Counseling and Referral Jeopardizes the Health of Women Served by Title X Clinics.**

By mandating silence about abortion while simultaneously compelling referral for prenatal care, section 59.8 will lead many low-income pregnant women served by Title X programs to wrongly believe that abortion is not a safe, legal option. Even those women who discover that abortion is an available alternative will suffer delay and increased health risks. In particular, section 59.8 will jeopardize the health of pregnant women who have complicating physical conditions that make abortion a medically advisable alternative to child birth.

The most vulnerable women in our society will be directly affected by section 59.8's prohibition on abortion counseling. Approximately ninety percent of the women served by Title X programs have incomes below 150 percent of the poverty line, *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279, slip op. at 6 (1st Cir. March 19, 1990) (citations omitted), and over thirty percent are teenagers. Affidavit of Dr. Melita Gesche, Director of the Bureau of Reproductive Health of the New York State Department of Health, ¶ 7 (545A, Ex. C-558A).<sup>4</sup> Low-income women and teenagers are least able to obtain adequate alternative health

<sup>3</sup> The sole exception to this mandatory referral for prenatal care is when "emergency care is required." In such circumstances, a clinic is permitted to refer a patient to "an appropriate provider of emergency medical services." 42 C.F.R. § 59.8(a)(2) (1989). See discussion *infra*, n.14.

<sup>4</sup> Citations to the appendix that accompanied the Petition of Dr. Irving Rust *et al.* and the Petition of the State of New York *et al.* are made to the page number therein as "(\_\_\_\_a)." Citations to other materials in the record below will be to "(\_\_\_\_A)" (referring to the joint appendix filed in the Second Circuit) or by name and date of document, if in the record but not included in either appendix.

care and bear the substantial economic burden of supporting and raising unwanted children. Moreover, the communities in which these women live suffer from disproportionately high rates of teenage pregnancy and epidemic health problems, such as AIDS, which increase the risks associated with pregnancy. Declaration of Dr. George Morley, President of the American College of Obstetricians and Gynecologists, ¶ 8, 10, 16 (661A-63A); Declaration of Prof. Howard Minkoff, Professor of Obstetrics and Gynecology, State of New York Health Science Center, ¶ 5 (647A).

Section 59.8's requirement that biased and incomplete information be presented to the low-income women served by Title X programs creates a substantial obstacle to their decision whether or not to terminate a pregnancy. It takes little imagination to understand how intimidation, concern for imposing on the physician's time, fear of offending him or her, or a lack of knowledge necessary even to begin to question their doctor's advice can keep Title X patients from asking about abortion. See Katz, *Physician-Patient Encounters "On a Darkling Plain,"* 9 W. New Eng. L. Rev. 207, 222 (1987). Since those Title X patients who do ask about the availability of abortion may be told only that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion," even they may believe—at least for a critical time period—that abortion is not appropriate for them or that they have no safe alternative to carrying their pregnancy to term. Declaration of Dr. Irving Rust, Medical Director of the Bronx Center of Planned Parenthood, New York City, ¶ 15 (92a). Believing they have no other alternatives, pregnant patients may even turn to life-threatening "home remedies" such as hazardous chemical douches or falling down stairs to avoid having unwanted children. Declaration of Dr. Irving Rust ¶¶ 11 (92a), 14-16 (704A-705A). For all women, section 59.8 interferes with their ability to decide between abortion and childbirth by depriving them of counseling essential to an informed choice.

Teenagers are especially vulnerable to the misleading message of the regulations. They are often scared, intimidated and alone when faced with pregnancy. Presented with the biased and misleading advice mandated by the regulations, an adolescent patient may well feel betrayed and uncared for by her physician, the very person she thought she could trust in her time of need. Declaration of Marilyn Bennett, Executive Director of Health Services, Hudson County, New Jersey, ¶¶ 19-22 (500A-501A); Affidavit of Dr. Richard Narkewicz, President of the American Academy of Pediatrics, ¶ 4 (February 2, 1988).<sup>5</sup> The regulations will undermine teenagers' confidence in Title X clinics and discourage many teenagers from ever returning for family planning services. Affidavit of Dr. Richard Narkewicz ¶ 4(c) (February 2, 1988).

By giving women inappropriate referrals to prenatal care providers, the regulations will also delay those women who are ultimately able to obtain abortions. Declaration of Dr. Stanley Henshaw, Deputy Director of Research, Alan Guttmacher Institute, ¶¶ 12, 15, 21 (600A-604A). Section 59.8 will require women to pursue referral after referral until they locate a doctor willing to perform abortions.<sup>6</sup> Misleading information is particularly problematic for the low-income women served by Title X programs who often lack access to a car or even a telephone and live in rural areas miles from the nearest family planning center. Declaration of Francine

<sup>5</sup> Recognizing the importance of counseling to adolescents with unwanted pregnancies, physicians have adopted more detailed and stringent ethical standards for their relationships with adolescents. See American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 22 (6th ed. 1985) ("[R]ecommendations should be specifically directed toward [the pregnant adolescents'] needs. Sensitivity, perceptive and in-depth discussions with the patient and those supporting her may be necessary."); American Academy of Pediatrics, Committee on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 *Pediatrics* 135, 136 (Jan. 1989) ("A warm and accepting environment in which the adolescent feels sufficiently secure to explore her own feelings about pregnancy and its consequences is essential.").

<sup>6</sup> The difficulty in locating an alternative provider of abortions is increasing as fewer doctors are willing to perform abortions for fear of harassment. N.Y. Times, Jan. 8, 1990 at A1, col. 1. It is not uncommon in many parts of the country for women to travel hundreds of miles to obtain an abortion. *Id.*

Stein, Executor Director of Planned Parenthood of Westchester and Rockland Counties, New York, ¶ 10 (February 4, 1988).

Delay can push patients into the second trimester of pregnancy, making an abortion more risky, costly and difficult to obtain. Declaration of Dr. George Morley ¶ 12 (79a).<sup>7</sup> Delay is particularly harmful to pregnant adolescents, whose fear and uncertainty often result in a late initial visit to the clinic. *Id.* at ¶ 12 (79a).

The regulations will have perhaps their crudest effect on those low-income pregnant women who have serious complicating conditions, such as hypertension,<sup>8</sup> eclampsia<sup>9</sup>, diabetes,<sup>10</sup> congenital heart disease,<sup>11</sup> cancer,<sup>12</sup> sickle-cell ane-

<sup>7</sup> Serious health risks go hand-in-hand with any delay. The mortality risk for abortion increases by 50% each week after the eighth week of pregnancy and the risk of major complications increases by approximately 30% each week after the eighth week. Declaration of Dr. George Morley ¶¶ 12-13 (79a).

<sup>8</sup> Hypertension complicates about eight to ten percent of pregnancies. *Clinical Obstetrics* 645 (C. Pauerstein ed. 1987). It may either be induced or aggravated by the pregnancy. While the hypertension can be controlled in the majority of cases, hypertensive pregnant women are at higher risk for cerebrovascular accidents (strokes), abruptio placentae (premature separation of the placenta from the uterus), and disseminated intravascular coagulation (a severe bleeding disorder). *Id.* at 655-56; *Maternal-Fetal Medicine* 801 (R. Creasey & R. Resnik 2d ed. 1989). See Declaration of Dr. Allan Rosenfield, Professor of Obstetrics-Gynecology and Public Health, Columbia University School of Public Health, ¶¶ 10-11 (681A-683A).

<sup>9</sup> A severe form of pregnancy-induced hypertension called eclampsia complicates about one tenth of one percent (0.1%) of deliveries. *Williams Obstetrics* 539 (J. Pritchard, P. MacDonald & N. Grant 17th ed. 1985). Eclampsia is characterized by headaches, visual disturbances, abdominal pain and seizures, and has a maternal mortality rate of up to 17% depending upon the adequacy of prenatal care and access to health care facilities. *Clinical Obstetrics*, *supra* note 8, at 647.

<sup>10</sup> Pregnancy-induced diabetes occurs in approximately one to three percent of pregnancies. *Medical Complications During Pregnancy* 41 (G. Burrow & T. Ferris 3d ed. 1988). In addition, approximately 1.5 million women of childbearing age are known to have diabetes. *Maternal-Fetal Medicine*, *supra* note 8, at 925. A pregnant woman with diabetes is four times as likely to develop hypertensive disease; she is also more likely to develop infections of a greater severity, injure her birth canal during vaginal delivery, require a caesarian section, and hemorrhage after delivery.

(Footnotes 11 and 12 appear on next page)

mia,<sup>13</sup> kidney disease and certain respiratory, urinary and neuromuscular disorders. Pregnancy greatly increases the long-term risks associated with each of these diseases, even when not necessarily generating an immediate health emergency.<sup>14</sup>

Because pregnancy can also accelerate the course of AIDS (Acquired Immune Deficiency Syndrome), abortions can prolong the lives of pregnant women suffering from AIDS. Declaration of Prof. Howard Minkoff ¶ 7 (647A-648A).<sup>15</sup> Moreover, pregnant women suffering from AIDS should be counseled about abortion in the context of the risk that their

---

*Williams Obstetrics*, *supra* note 9, at 600. See Declaration of Dr. Irving Rust ¶ 17 (705A-706A).

11 There is a 50% possibility that the additional stress of pregnancy will kill women with severe malformations of the heart caused by congenital heart disease. *Obstetrics & Gynecology* 231 (D. Danforth & J. Scott 5th ed. 1986). Pregnant women with heart disease are at greater risk of congestive heart failure, cardiac infections and arrhythmias (abnormal heart rhythms). *Id.* at 492-97; *Maternal-Fetal Medicine*, *supra* note 8, at 749-58.

12 Cancer is the second leading cause of death among women in their reproductive years; it can threaten the fetus as well as the woman. Williams & Britan, *Cancer and Pregnancy*, 12 Clin. Perinatology. 609 (1985). The chemotherapy or radiation that may be necessary to preserve the life or health of a woman with cancer is likely to result in fetal malformation or death.

13 Pregnant women with sickle-cell anemia experience more frequent and severe crises, especially in bones, and are more susceptible to pneumonia and urinary tract infections, increasingly severe anemia, congestive heart failure, pre-eclampsia, and pulmonary complications such as embolus. Declaration of Dr. Allan Rosenfield ¶ 14 (684A); see also Fort, Morrison, Berreras, Diggs and Fish, *Counseling the Patient With Sickle Cell Disease About Reproduction: Pregnancy Outcome Does Not Justify the Maternal Risk*, 111 Am. J. of Obstetrics and Gynecology 324 (Sept.-Dec. 1971).

14 Hypertension, pre-eclampsia, diabetes, congenital heart disease or cancer when discovered in conjunction with pregnancy do not constitute an "emergency" under the regulations, requiring referral to the emergency room of a nearby hospital. Declaration of Dr. Irving Rust ¶ 17 (92a-93a); Declaration of Dr. Allan Rosenfield ¶¶ 21-22 (687A-689A). The emergency exception is far too subjective and narrow to prevent the harm caused by the regulations' prohibition on abortion counseling and referral.

15 See Minkoff, *Care of Pregnant Women Infected With Human Immunodeficiency Virus*, 258 J. of Am. Med. Ass'n 2714 (1987).

newborn babies will be HIV-infected.<sup>16</sup> Similarly, a pregnant woman infected with a disease such as rubella, herpes, or syphilis that could have a devastating effect on her fetus should also be counseled about her options.<sup>17</sup> Even in these circumstances, the regulations prevent a woman from being counseled about the option of abortion.

While professionals in Title X clinics are permitted to disclose the existence of AIDS or other complicating conditions to their patients, they may not discuss abortion as an alternative to carrying the pregnancy to term. Declaration of Dr. George Morley ¶ 17 (664A); Declaration of Prof. Howard Minkoff ¶ 8 (648A); Declaration of Dr. Allan Rosenfield ¶¶ 21-22 (687A-689A). As a result, women with serious complicating conditions are prevented from learning that their pregnancy poses substantial health risks that may require an abortion to save their life or preserve their health. Section 59.8's mandated referral to prenatal care may also reinforce the false impression that the pregnancy does not threaten their health or the health of the fetus.

The regulations create obstacles which prevent women served by Title X programs from freely choosing between abortion and childbirth. Left unreviewed by this Court, the decision below will have a devastating impact on the health of these low-income pregnant women, including those with life-threatening medical complications. *Amici* respectfully ask this Court to grant the writ sought by petitioners, rather than turn its back on the myriad dangers which threaten the health and well-being of pregnant women.

---

16 Thirty to fifty percent of the babies whose mothers are HIV-infected will also develop AIDS. Exhibit F to Affidavit of Dr. Melita Gesche (New York State Department of Health, *Newborn Seroprevalence Study* (1988)) (563A).

17 For example, a fetus exposed to a rubella infection during the first four weeks of gestation has a 61% chance of developing congenital defects, including ocular and cardio-vascular anomalies, mental retardation, and early onset diabetes. *Genetics in Obstetrics and Gynecology* 229-30 (Simpson ed. 1982).

**B. Section 59.8 of the Regulations Interferes with the Integrity of the Physician-Patient Relationship by Forcing Physicians to Depart from Their Professional Code of Ethics, Preventing Them from Exercising Their Best Judgment and Exposing Them to Liability for Malpractice.**

This case raises the important question of whether the federal government, through funding restrictions on speech and information about abortion, can legitimately compel health care professionals practicing in Title X clinics to violate their ethical standards and ignore individual patients' needs. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 431 (1983), this Court declared that the government's discretion to regulate abortions does not permit it to adopt regulations "that depart from accepted medical practice." In the face of this admonition, section 59.8 requires Title X practitioners to violate their professional code of ethics, prevents them from exercising their best medical judgment and exposes them to liability for malpractice.

Under principles of medical ethics and the law of informed consent, a physician is obliged to render care in a manner respectful of his or her patient's right to self-determination. The physician must disclose sufficient information regarding the patient's condition and treatment alternatives to permit the patient to make an informed decision about appropriate treatment and to know where it can be obtained.<sup>18</sup> Nowhere is this more important than when the patient is a pregnant woman facing a medical decision with dramatic and irreversible life consequences. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986) ("few decisions are . . . more basic to individual dignity and autonomy" than a woman's reproductive choice). The pregnant woman's physician plays a central role in her decision-making process by providing her with the crucial medical facts relevant to her decision whether to terminate her pregnancy. By prohibiting physicians and other health care work-

18 See, e.g., American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* ¶ 8.07, at 31-32 (1989) [hereinafter *AMA Opinions*]; *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972).

ers in Title X clinics from giving a pregnant patient complete medical information regarding childbirth and abortion, section 59.8 denies that patient the opportunity to intelligently make the personal and self-defining decision of whether or not to carry a pregnancy to term.<sup>19</sup>

Section 59.8 thus compels Title X physicians to breach their code of ethics in *every* case of pregnancy, even if no complicating condition exists. Contrary to professional standards that require balanced counseling and discussion of the full range of options to which a woman is entitled when pregnancy is diagnosed, the regulations require Title X health care providers to direct their counseling solely towards preventing abortion and promoting childbirth.<sup>20</sup>

The regulations prevent Title X physicians from properly caring for their patients whenever a woman is undecided and particularly when a pregnancy is unwanted.<sup>21</sup> Section 59.8's

19 When divorced from the abortion controversy, a physician's breach of ethics for failure to communicate complete, unbiased information essential to a medical decision becomes immediately apparent. Imagine if the government were to decree that oncologists working in federally-funded clinics could not mention chemotherapy as a treatment alternative to cancer patients.

20 The American College of Obstetricians and Gynecologists standard of care establishes that:

Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or range of options to which the patient is entitled. Appropriately balanced counseling, combined with available and accessible facilities, provide the *minimum* base for the opportunity to make a truly informed choice.

American College of Obstetricians and Gynecologists, *Statement of Policy: Further Ethical Considerations in Induced Abortion* (Dec. 1977) (emphasis added). See also *AMA Opinions*, *supra* note 18, ¶ 8.07, at 31-32 (1989); Affidavit of Dr. James H. Sammons, Executive Vice President of the American Medical Association ¶ 3 (80a-81a). These ethical obligations apply regardless of the physicians' source of income or payment.

21 Professional standards provide that "[i]n the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy." American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 57 (6th ed. 1985).

compelled disclosure of information intended to promote the health of the "mother" and "unborn child" and referrals of women with unwanted pregnancies to prenatal care providers interfere with physicians' ethical responsibility to respect the dignity of these patients.<sup>22</sup> Even if a patient requests abortion information, her physician must mechanically recite the Secretary's prescribed response: "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5) (1988). The regulations thus compel physicians to insult their pregnant patients' dignity by forcing these women to listen to irrelevant and at times painful information and by depriving them of information necessary to make and effectuate an informed decision.

By forcing Title X physicians to ignore their pregnant patient's need for information necessary to her decision and subsequent care—a patient the physician knows may have no affordable and safe health care alternative—the regulations require physicians to disregard their most fundamental ethical obligation: not to neglect a patient.<sup>23</sup> Whether or not physicians favor or perform abortions themselves, they are obligated to refer a patient who chooses to terminate her pregnancy to a competent physician who will be responsive to her medical and psychological needs.<sup>24</sup> Because any delay can be dangerous, a frank discussion of medical risks and alternatives becomes most critical to the continued health of the patient when a physician terminates his care and provides a

22 American Medical Association, *Principles of Medical Ethics*, in *AMA Opinions*, *supra* note 18 at ix ("A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity.").

23 *AMA Opinions*, *supra* note 18, ¶ 8.10, at 33 ("Once having undertaken a case, the physician should not neglect the patient . . . ."); Declaration of Dr. Jay Katz, Professor of Law and Psychoanalysis, Yale University, ¶ 6 (83a-84a).

24 See *AMA Opinions*, *supra* note 18, ¶ 3.04 at 14; President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, vol. 1 at 76 (1982) [hereinafter President's Commission].

referral. The regulations forbid Title X practitioners from fulfilling this obligation and facilitating their patients' constitutionally-protected reproductive choice.

Compliance with section 59.8 will not only result in ethical violations but it will also prevent physicians in many situations from exercising and acting in accordance with their best medical judgment. The regulation precludes physicians from providing necessary counseling to a woman whose pregnancy will exacerbate an existing complicating condition. Moreover, physicians must provide even the patient for whom abortion is medically indicated with an undifferentiated list of prenatal care providers, some of which may perform abortions but none "whose principal business is the provision of abortions." 42 C.F.R. § 59.8(a)(3) (1989).<sup>25</sup>

Consequently, by requiring physicians to withhold even medically advisable information and provide inappropriate referrals, section 59.8 will expose Title X physicians to liability for medical malpractice and violations of informed consent for any resulting harm to their pregnant patients.<sup>26</sup> Physicians have been found liable for failing to inform parents at risk of giving birth to a child with genetic or other abnormalities of prenatal diagnostic tests and the option of abortion.<sup>27</sup> Physicians who fail to refer immediately a woman

25 Because 70% of all abortions are performed by providers whose "principal business" is abortions, the regulations will obstruct access to the majority of providers, particularly the most proficient and experienced. Declaration of Dr. Stanley Henshaw, Deputy Director of Research for the Alan Guttmacher Institute, New York City, ¶ 12 (600A).

26 Under the doctrine of informed consent, embodied in state tort law nationwide, a physician may be liable for failure to inform patients of all alternative treatment options, failure to provide adequate information regarding health risks (including the risk of not undergoing a certain medical procedure), and failure to provide appropriate referrals. See *President's Commission*, *supra* note 24, Appendix L at 193; Andrews, *Informed Consent Statutes and the Decisionmaking Process*, 5 J. of Legal Medicine 163 (1984).

27 See, e.g., *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (failure to diagnose rubella and inform parents of risk to fetus); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981) (failure to advise, counsel and test for risk of Down's Syndrome); *Goldberg v. Ruskin*, 128 Ill. App. 3d

for whom abortion is medically indicated to an appropriate provider may be liable for the harm and increased risk of a delayed termination of her pregnancy.<sup>28</sup>

Left unreviewed by this Court, the decision below will place practitioners at Title X clinics in an untenable position. Physicians will either have to comply with the regulations and thereby depart from accepted standards of medical practice or leave Title X clinics. The regulations will force those doctors who continue to serve poor women in Title X facilities to severely compromise the quality of their care. *Amici* respectfully request that the Court grant the writ sought by Petitioners to preserve the integrity of the physician-patient relationship and prevent the regulations from denigrating the medical profession and undermining the quality of family planning services provided to low-income women.

### C. The Regulations Will Engender a Two-Tiered System of Health Care by Severely Diminishing the Availability of Quality Family Planning Services for Low-Income Women.

If implemented, the regulations will exacerbate the already critical shortage of quality health care in low-income communities. Local family planning clinics offering comprehen-

---

1029, 471 N.E.2d 530 (Ill. App. Ct. 1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (Ill. 1986) (failure to advise parents of tests designed to detect Tay Sachs disease); *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (N.H. 1986) (failure to timely diagnose rubella and inform parents of consequences); *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (N.J. 1979) (failure to inform parents of the availability of amniocentesis to detect Down's Syndrome); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (N.Y. 1978) (same). See generally S. Elias & G.J. Annas, *Reproductive Genetics and the Law* 109-10 (1977).

28 See, e.g., *Steele v. United States*, 463 F. Supp. 321, 330 (D. Alaska 1978) (failure to refer patient to qualified medical practitioner that results in delay in treatment is breach of standard of care); *Lindquist v. Dengel*, 92 Wash. 2d 257, 263, 595 P.2d 934, 937 (Wash. 1979) ("To delay a referral [to a specialist when diagnosis indicates such expert treatment is required] could itself be a breach of the general practitioner's duty."); *Manion v. Tweedy*, 257 Minn. 59, 65, 100 N.W.2d 124, 128 (Minn. 1959) (if physician knows or should know that a patient's condition is beyond his knowledge, ability or capacity to treat, he must advise the patient of necessity of other treatment).

sive health care, funded to a significant degree by Title X, play a vitally important role in low-income communities. See Forrest, *The Delivery of Family Planning Services in the United States*, 20 Fam. Plan. Persp. 91 (1988). Apart from Title X-funded facilities, many women and adolescents have no other health care providers or sources of information about reproductive and general health care. See e.g., Affidavit of Dr. Stephen Joseph, Commissioner of Health for City of New York, ¶ 8 (611A); Declaration of P. Roe ¶ 5, 7 (96a); Declaration of M. Roe ¶ 6 (696A); Declaration of L. Roe ¶ 4, 7 (97a).<sup>29</sup>

The regulations endanger the very existence of Title X-funded clinics in two ways. First, the regulations will severely impair the clinics' ability to hire and retain competent health care professionals by threatening them with censure, loss of license or legal liability for malpractice. As a result, Title X programs will be paralyzed by attrition and face the difficult task of attempting to find suitable replacements. Declaration of Dr. Jay Katz ¶ 18 (634A); Declaration of Lorraine Tiezzi ¶ 8(c) (728A).

Second, the regulations' requirement that Title X-funded clinics be physically and financially separate from any activity relating to abortion, 42 C.F.R. § 59.9, seriously threatens their ability to provide comprehensive reproductive care and, indeed, remain in operation at all. The measures contemplated by the separation requirement, which include the maintenance of separate physical facilities and separate personnel, "will in many cases be prohibitively expensive and

---

29 Even HHS has acknowledged that "[f]or many patients, family planning clinics are their *only* source of health information or medical care." United States Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981) (39A) (emphasis added). Recipients of Title X funds routinely provide non-reproductive medical services to both men and women. Medical services for women include diagnosis and treatment of sexually transmitted diseases, HIV testing, screening tests for cervical cancer, breast examinations and self-breast examination instruction. Medical services for men include vasectomies and post-surgical follow-up examinations, primary urological examinations, diagnosis and treatment of venereal disease and other sexually transmitted infections, and HIV testing. Affidavit of Ruth Klepper, Executive Director of Upper Hudson Planned Parenthood ¶ 8-11 (February 5, 1988).

operationally untenable." Declaration of Raymond Fink, Chairperson of the Medical and Health Research Association of New York City, Inc., ¶ 13(a) (539A).

The regulations' attack on the Title X program will reinforce the dual system of health care that already exists in the United States. Declaration of Raymond Fink ¶ 12(a) (536A). Women of means, unaffected by the regulations, will continue to have access to sound health care from private practitioners. In contrast, low-income women and adolescents will have difficulty locating any family planning services or general health care at all. Even if they are able to find a family planning program, they will receive incomplete and biased information from doctors compelled to disseminate the government's anti-abortion message at clinics which cannot provide sound comprehensive reproductive health care. If left unreviewed, the practical effect of the decision below will be to endanger the health of Title X clients by diminishing the availability of comprehensive quality family planning services in communities already facing a critical shortage of health care.

## **II. THE DECISION BELOW CONTRAVENES RULINGS OF THIS COURT THAT PROTECT THE PHYSICIAN-PATIENT DIALOGUE REGARDING A WOMAN'S DECISION TO TERMINATE HER PREGNANCY.**

This Court should grant the writ sought by Petitioners because the decision below is contrary to precedent that guarantees privacy and First Amendment protection to the physician-patient dialogue regarding a woman's decision to terminate her pregnancy. As demonstrated above, and as the First Circuit recognizes, the regulations pose a significant obstacle to a woman's decision to terminate her pregnancy by precluding her from obtaining from her physician the very information she needs to make her constitutionally-protected reproductive choice. See *Massachusetts v. Secretary of Health and Human Services*, slip. op. at 30. Nevertheless, the Second Circuit, relying on *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), *Harris v. McRae*, 448 U.S. 297,

*reh'g denied*, 448 U.S. 917 (1980) and *Maher v. Roe*, 432 U.S. 464 (1977), held that the regulations merely implement a legitimate funding decision to support childbirth over abortion. See *New York v. Sullivan*, 889 F.2d 401, 411 (2d Cir. 1989).

In resolving this clear conflict between the circuits, the Court must be mindful of its previous rulings. This Court has consistently held that the government cannot obstruct fundamental procreative choice by placing a "governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *Webster*, 109 S. Ct. at 3052 (quoting *McRae*, 448 U.S. at 315). It is equally well-established that the government may not impose such obstacles through public-funding restrictions any more than it can through other means. See *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) (conditions on public benefits that inhibit or deter constitutionally-protected rights are unconstitutional); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 405 (1963); *Speiser v. Randall*, 357 U.S. 513, 518-19, *reh'g denied*, 358 U.S. 860 (1958).

To protect the right at the heart of *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973)—the right to be free from unwarranted governmental interference in the process of deciding whether or not to bear a child—this Court has repeatedly shielded the decisionmaking process from undue governmental influence and distortion. In *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (1983), this Court struck down a law requiring physicians to furnish a pregnant woman contemplating abortion with certain information about the surgical procedure and the physiological characteristics of the fetus, some of which was misleading. Akron's ordinance "unreasonably . . . placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.' " *Id.* at 444-445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)). This Court reasoned that "full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' " *Id.* at 427 (quoting *Doe v. Bolton*,

410 U.S. 179, 192 (1973)). That room required preserving the discretion of a pregnant woman's physician to provide his or her patient with information relevant to her particular needs. *Id.* at 443. The government's attempt to structure the informed consent dialogue was impermissible precisely because it was "designed to influence the woman's informed choice between abortion and childbirth." *Id.* at 444.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), this Court reaffirmed the principle that physicians may not be compelled to convey a distorted message to their patients by withholding essential, or providing unnecessary or misleading, medical information designed to influence their patients' right to reproductive choice. It therefore invalidated a state statute requiring a physician to provide a woman with a description of fetal development and a list of agencies offering alternatives to abortion. In doing so, this Court found the requirement to be "nothing less than an outright attempt to wedge the [government's] message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Thornburgh*, 476 U.S. at 762.

By dictating the precise content of the physician-patient dialogue, the Title X regulations at issue place an even more constricting "strait jacket" on a Title X physician's relationship with patients and erect an even more imposing obstacle to a woman's choice than did the statute at issue in *Thornburgh*. Not only do the regulations forbid Title X practitioners from counseling women about abortion and providing appropriate referrals to women who choose it, but they also demand that physicians furnish *all* patients with information and a list of available providers that promote the health of "the mother and unborn child." 42 C.F.R. § 59.8(a)(2) (1989). The regulations thus compel physicians to provide biased information and referrals that will be completely unresponsive to the needs and requests of their individual patients. As discussed in Section I(A), the regulations will lead some women to believe that abortion is either unavailable or inappropriate. For others, the provision of misleading referrals will delay and perhaps even prevent a woman from obtaining the procedure. Thus, unlike the provisions in

*Maher* and *McRae*, the regulations "create[ ] a new and imposing obstacle to abortion." *Massachusetts v. Secretary of Health and Human Services*, slip op. at 43.

Through the medium of funding, the government is attempting to suppress speech about abortion and to turn Title X practitioners into spokespersons for the government's anti-abortion message, in violation of not only the constitutional right to reproductive choice but also First Amendment principles. In the words of Justice Douglas, "[t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513, *reh'g denied*, 368 U.S. 869 (1961) (Douglas, J., dissenting from a dismissal on technical grounds). By obstructing the free flow of vital medical information between doctor and patient, the regulations impermissibly censor speech essential to both the sound practice of medicine and a woman's constitutionally protected right to decide whether to terminate a pregnancy.

Moreover, by simultaneously compelling advice regarding prenatal care and prohibiting speech about abortion, sections 59.8 and 59.10<sup>30</sup> discriminate on the basis of viewpoint. They thus flout this Court's repeated warning that the government may not "discriminate invidiously in its subsidies in such a way as to ai[m] at the suppression of dangerous ideas." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)); see also *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-13 (1985). The suppressive nature of the regulations will be uniquely powerful because they target a dependent and vulnerable population for whom there are limited, if any, alternative sources of abortion information.

Left unreviewed by this Court, the decision below will permit the federal government to restructure the physician-patient dialogue in Title X-funded clinics in a manner

---

<sup>30</sup> Section 59.10 prohibits the use of Title X funds for activities that "encourage, promote or advocate abortion," including lobbying, legal action and disseminating materials. 42 C.F.R. § 59.10(a) (1989).

intended to mislead and intimidate women into relinquishing their constitutionally protected reproductive choice and continuing an unwanted, at times dangerous, pregnancy to term. *Amici* respectfully urge this Court to review and condemn, as it has in the past, this "effort to deter a woman from making a decision that, with her physician, is hers to make." *Massachusetts v. Secretary of Health and Human Services*, slip op. at 34 (quoting *Thornburgh*, 476 U.S. at 759).

## CONCLUSION

For all the foregoing reasons, this Court should grant the writ of certiorari sought by petitioners.

Dated: May 4, 1990

Respectfully submitted,

John H. Hall  
*Counsel of Record*  
Geoffrey H. Coll  
Randi J. Roberts  
Debevoise & Plimpton  
875 Third Avenue  
New York, New York 10022  
(212) 909-6000

Attorneys for *Amici Curiae*

### *Of Counsel:*

Nadine Taub  
Rutgers University School of Law  
15 Washington Street  
Newark, New Jersey 07102

Sarah E. Burns, Legal Director  
NOW Legal Defense and Education Fund  
99 Hudson Street  
12th Floor  
New York, New York 10013

## **APPENDIX A**

**INTEREST OF *AMICI CURIAE* ORGANIZATIONS**

The AMERICAN ASSOCIATION OF UNIVERSITY WOMEN ("AAUW"), a nationwide network of 140,000 college-educated women, promotes equity for women and girls, education and self-development over the life span, and positive social change. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care and to be informed of all available reproductive health care options. AAUW believes that decisions concerning reproductive health care are personal ones and that the right to make informed decisions should be available to all women.

AMERICAN ETHICAL UNION is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. The Ethical Movement was founded in 1876 in New York City. At present there are approximately 4,000 members nationwide belonging to the Ethical Movement.

AMERICAN HUMANIST ASSOCIATION ("AHA") is an educational and philosophical-religious organization founded in 1941. The association and its members oppose interference with the right of medical professionals to provide information to clients and the right of clients to receive uncensored counseling from medical professionals in tax-funded programs. The Association and its members oppose, as Establishment Clause violations, government regulations which have the effect of imposing sectarian religious values in tax-funded programs.

The AMERICAN JEWISH COMMITTEE ("AJC") is a national organization of 40,000 members, founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including the fundamental right of access to abortion on a voluntary basis.

The AMERICAN JEWISH CONGRESS is an organization of American Jews founded in 1918 to protect the civil, political and religious rights of American Jews and all Americans. For three decades it has vigorously supported reproductive choice, beginning with a 1958 AJC-led campaign to allow municipal hospitals in New York City to dispense contraceptive devices and advice to patients.

AMERICAN MEDICAL WOMEN'S ASSOCIATION ("AMWA") is a nonprofit organization of 12,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

The AMERICAN NURSES' ASSOCIATION ("ANA") is an association of registered nurses that is dedicated to the advancement of goals and interests of registered nurses and of the nursing professional generally. Founded in 1897, the ANA is comprised of fifty-three constituent member organizations. Registered nurses constitute the largest group of health care providers in this country; there presently are approximately two million registered nurses in the United States. As health care providers, nurses have a long and proud history of support for a fair and equitable health care delivery system in which all Americans have access to basic health services, including services related to reproductive health.

The AMERICAN PUBLIC HEALTH ASSOCIATION ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is now the largest public health organization in the world, with over 50,000 members, including 51 state and local affiliate organizations. The APHA represents all disciplines and specialties in public health, including both patients and health profes-

sionals such as physicians, nurses, health educators, and family planning specialists.

AMERICANS FOR RELIGIOUS LIBERTY ("ARL") is a nonprofit, national educational organization whose members represent nearly the entire religious spectrum. ARL is dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL opposes censorship and any action by government which would prevent counselors from providing full services to clients on reproductive matters.

The ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND ("AALDEF"), founded in 1974, is a national civil rights organization that addresses the critical problems facing Asian American communities, including anti-Asian violence, immigrant rights, voting rights, labor and employment rights, and redress for Japanese Americans who were incarcerated in camps in the United States during World War II. AALDEF seeks to improve the quality of life for Asian immigrant women, who constitute the largest sector of Asian women in the United States. AALDEF has assisted in the formation of the Asian Women's Center located in New York City, which provides shelter with bilingual services for battered women. AALDEF is committed to protecting the fundamental right to reproductive choice by women utilizing health clinics that are funded under Title X of the Public Health and Human Services Act.

The ASSOCIATION FOR WOMEN IN PSYCHOLOGY is an incorporated, nonprofit national educational and scientific organization for feminist psychology founded in 1969. As an organization, it is concerned with the rights of women to function as fully autonomous human beings. Psychological evidence supports freedom of choice as being conducive to good mental health, so that any attempt to limit a woman's freedom of choice regarding reproductive issues is detrimental to her psychological health and well-being. It believes that her right to choose, and access to information facilitating

choice in reproductive matters, should not be denied in the interest of any outside authority.

The ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS is a professional organization of physicians, nurses and other reproductive health care providers. Its principal objective is to educate its professional members and the public on matters pertaining to reproductive health. Among the health care services its members provide are education and counseling on sexually transmitted diseases, contraception and abortion, in a variety of settings including facilities that obtain Title X funding.

BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, incorporated in 1972, is a nonprofit educational organization devoted to women and health. The organization provides information, resources and technical assistance to the media, health care workers, policy makers, students, women's organizations in the U.S. as well as in other countries, and individuals with particular concerns. It serves about 10,000 persons every year. It is deeply concerned about this matter because high quality, accessible family planning and abortion services are crucial to the health and well-being of women and their families.

The CALIFORNIA COALITION OF NURSE PRACTITIONERS (the "Coalition") represents approximately 5,000 nurse practitioners throughout the state, many of whom work in federally-funded family planning clinics. As an organization representing those nurse practitioners, the Coalition is concerned that the Title X funding of family planning clinics continue without unnecessary governmental interference.

CATHOLICS FOR A FREE CHOICE ("CFFC") is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal rights of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S.

Constitution but also on the Roman Catholic Declaration on Religious Liberty, Vatican II Dignitatis humanae, 7 December 1965, which declares: ". . . the civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated and that there is no discrimination among its citizens."

The COALITION OF LABOR UNION WOMEN ("CLUW") is a membership organization of 20,000 female and male trade unionists who promote the rights of working women. CLUW, since its founding in 1974, has advocated workplace rules and practices that protect all workers.

COMISION FEMENIL MEXICANA NACIONAL ("CFMN") was founded in 1970 in order to advocate for the needs of the Hispanic woman and her family. CFMN has chartered over 23 chapters and successfully established three human service agencies—Chicano Service Action Center, Centro de Ninos and Casa Victoria. CFMN has a membership base of over 3,000, strongest in California but stretching throughout the southwest. CFMN is a pro-choice organization and believes strongly that every woman, regardless of race or economic status, is entitled to the right of reproductive freedom. CFMN has been in several lawsuits as a co-plaintiff and works tirelessly to ensure the basic freedom of choice for all women.

The CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND was incorporated in 1973 as a nonprofit public interest law firm advocating for women's legal rights. It has over 400 members and serves thousands of people in New England each year through its litigation, community education, research, and information and referral programs. It joins this brief as *amicus curiae* because it believes it is essential to protect the rights of all citizens to privacy and freedom in reproductive choices. As an organization working for equality, it believes that every woman, without regard to religious belief, income, race, age or disability, must have an equal opportunity to control her own health and reproduction.

The COORDINATING CENTER FOR WOMEN IN CHURCH AND SOCIETY was founded by the 1.7 million member United Church of Christ in 1980 to address the concerns of women and eliminate sexism in Church and Society. The Center is committed to a broad range of strategies to protect reproductive freedom and keep abortion safe and legal. The work of the Center is supported and informed by the policies of the General Synod which has maintained a strong freedom of choice position for two decades.

EQUAL RIGHTS ADVOCATES ("ERA") is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

FAMILY PLANNING ADVOCATES OF NEW YORK STATE ("FPA") is the only statewide membership organization dedicated to promoting policies on the full range of reproductive health issues. It is supported by more than 100 organizations, including Planned Parenthood and other family planning agencies, as well as individuals and organizations representative of a wide range of health, welfare and religious groups. FPA is the upstate coordinator for the New York State Campaign for Abortion Rights (NYSCAR).

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, founded in 1973, is the nation's oldest and largest national legal advocacy organization working to further the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to individual liberty, decision making, and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion and other reproductive decisions. Since the early 1980's Lambda has also advocated on behalf of people with AIDS who face

discrimination and loss of confidentiality with regard to their healthcare. Lambda strongly opposes the regulations at issue in this case not only because they fail to support the right of a woman to make her own reproductive decisions, but also because of the devastating impact these regulations will have on women with a variety of physical conditions or illnesses, including HIV-related illnesses, which might lead her to consider abortion as an option.

THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES ("LWVUS") is a nonpartisan, nonprofit membership organization with members in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Since its inception in 1920, the LWVUS's purpose has been to promote political responsibility through the informed and active participation of citizens in government. The LWVUS is strongly committed to the belief that the public policy in a pluralistic society must affirm the constitutional right of the individual to make reproductive choices.

THE LYMPHOMA FOUNDATION OF AMERICA is a nonprofit charitable organization formed in 1986 by cancer patients and their families. Lymphoma and Hodgkin's disease are types of cancer. The Foundation sponsors support groups and educational programs. Lymphoma Foundation of America believes that every individual has the right to be fully informed about all medical treatments and therapies for his or her particular condition. The Foundation believes that denying someone information about the option of abortion is the same as denying a cancer patient information about the option of having surgery, drugs, or radiation. Withholding basic medical information from someone in need is morally, ethically, medically, and legally wrong.

NAACOG: THE ORGANIZATION FOR OBSTETRIC, GYNECOLOGIC, AND NEONATAL NURSES is the professional nursing organization for 24,000 OGN nurses. Established in 1969, NAACOG members are nurses and allied health care professionals who practice throughout the United States and its territories, Canada, Germany, and Korea.

NAACOG represents the interests of its members whose common concern centers around access to care and quality of care for women, infants, and their families.

The NATIONAL ABORTION RIGHTS ACTION LEAGUE ("NARAL"), has over 400,000 members in 40 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

The NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN REPRODUCTIVE HEALTH ("NANPRH") represents eight hundred nurse practitioners in the field of reproductive health, many of whom work in federally-funded family planning clinics. The NANPRH believes that it is a professional standard that nurses and other health professionals present all available medical options to women faced with pregnancies. Furthermore, the NANPRH believes that it is essential that federally-funded family planning clinics continue to receive Title X funds.

The NATIONAL CENTER FOR LESBIAN RIGHTS ("NCLR"), formerly the Lesbian Rights Project, is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of their sexual orientation, including the area of reproductive rights. NCLR is a national organization with a strong commitment to increasing access to reproductive rights for women, specifically for lesbians, and has demonstrated that commitment through both litigation and community education. Because lesbians are confronted with obstacles, both as women and lesbians, from gaining access to their reproductive rights, NCLR is well qualified to appear as *amicus curiae* before this Court.

The NATIONAL COUNCIL OF JEWISH WOMEN ("NCJW"), founded in 1893, is the oldest Jewish women's organization in America. NCJW's 100,000 members in more than 200 sections across the United States keep the organiza-

tion's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our national resolutions, which include working for the "protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom," NCJW joins this brief.

The NATIONAL FEDERATION OF TEMPLE SISTERHOODS represents women of reform judaism. It includes over 100,000 women in over 500 communities throughout the United States. The organization believes that the right of choice on the question of abortion is a personal decision based on the individual woman's religious, moral or cultural values, that this decision should not be determined for others by special interest groups, and that the government should not be the enforcing agency for the points of view of such groups.

The NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY is a nonprofit national advocacy group based in Washington, D.C. Founded in the summer of 1989, the Center monitors—and, where necessary, enforces—federal laws to aid homeless and poor persons. In addition, the Center promotes public policies designed to aid homeless and poor persons. In conducting its activities, the Center regularly takes public positions in support of the interests of the homeless and the poor. The Center believes that further restrictions on federal funding of family planning programs will unfairly and disproportionately burden poor women. Because the Center also believes that these restrictions are illegal, it joins in opposing them.

The NATIONAL LAWYERS GUILD is a national organization representing 8,000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters throughout the United States. Since its founding in 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The Guild is firmly

committed and is working actively to protect the rights of all people, and specifically the right of every woman to have access to all forms of family planning, including safe and legal abortion.

The NATIONAL WOMAN'S PARTY, founded in 1913 by Alice Paul, suffragist and author of the Equal Rights Amendment, passed at its September 29, 1989 national convention a resolution on pro-choice, supporting federal, state and local legislation that affirms a woman's right of reproductive choice.

The NATIONAL WOMEN'S CONFERENCE COMMITTEE ("NWCC"), is the continuing committee of the International Women's Year. Founded in 1977, the organization is committed to the "National Plan of Action." The Plan supports among other things the right of pregnant women to choose. NWCC is a national organization pleased to join in this *amicus curiae* brief.

The NATIONAL WOMEN'S HEALTH NETWORK is a national public interest group representing over 500,000 women nationwide. The Network advocates for better governmental health policies regarding women, including access to low-cost family planning services.

The NATIONAL WOMEN'S LAW CENTER is a Washington, D.C.-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of all women. Because of the harsh impact of the Title X prohibition on abortion counseling and referral on the reproductive rights and health of poor women, who are disproportionately women of color, the Center joins as *amicus curiae* to urge the Court to grant petitioners' writ of certiorari.

NATIONAL WOMEN'S POLITICAL CAUCUS is a multi-partisan, nonprofit national membership organization. Founded in 1971, it has over 70,000 members. The CAUCUS works to increase women's political representation and for

social and economic justice for all. The right to reproductive freedom regardless of economic status is one of the CAUCUS' primary goals. The regulations at issue in the present case infringe on women's equal access to information and full medical treatment. This infringement is reprehensible and the CAUCUS signs on as a friend of the court in support of women's equality.

NEW JEWISH AGENDA ("Agenda") is an organization comprised of Jews from a variety of backgrounds and affiliations. Drawing on the Talmudic teaching of *tikkun olam*, the just reordering of society, Agenda works for peace and social justice by applying Jewish religious and secular history and values to local organizing on current domestic and international concerns. Priority issues include peace and justice in the Middle East and Central America, feminism, disarmament, economic and social justice, lesbian and gay rights, and opposition to racism, anti-Semitism and apartheid. New Jewish Agenda was founded in December, 1980 and now has chapters in more than 45 American cities. Agenda's 5,000 members work to foster traditional progressive Jewish values and to promote Jewish participation in progressive coalitions.

The NEW YORK STATE REPUBLICAN FAMILY COMMITTEE is an educational agency advocacy organization devoted to promoting policies that foster maximum choice, particularly in matters of health. Founded in 1984, the Committee has over 300 Republican party members with ninety-nine percent residing in New York State. Its membership includes lawyers, health care professionals, business people, educators, philanthropists, and numerous civic and political leaders.

The NORTHWEST WOMEN'S LAW CENTER is a private nonprofit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, legislation, education, and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Cen-

ter has participated in several cases involving reproductive rights before the U.S. Supreme Court and other courts.

The NOW LEGAL DEFENSE AND EDUCATION FUND ("NOW LDEF") is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination, secure equal rights, and preserve reproductive options under law.

The PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND is a national organization founded in 1972 to protect civil rights and to ensure equal protection of the laws for Puerto Ricans and other Latinos. The Fund has participated in lawsuits and has served as an advocate to ensure that Latinos have access to full and adequate health care, including family planning. The Fund recognizes that restrictions or limitations on the provision of health services, including information concerning abortions, deny women access necessary to fully exercise their rights, and place Latinos at an even greater risk of inadequate and dangerous treatment and unwanted pregnancies.

The RELIGIOUS COALITION FOR ABORTION RIGHTS ("RCAR") is a national coalition of 34 Protestant, Jewish and other faith groups committed to religious freedom and reproductive rights. Because each denomination and faith group represented in RCAR approaches the issue of choice from the unique perspective of its own theology, members hold widely varying viewpoints as to when abortion is morally justified. It is exactly this plurality of beliefs which leads RCAR to the conviction that the abortion decision must remain with the individual to be made on the basis of conscience and personal religious principles, free from governmental interference.

The SEX INFORMATION AND EDUCATION COUNCIL OF THE U.S. ("SIECUS") is a twenty-five year-old national nonprofit organization headquartered in New York. SIECUS affirms that sexuality is a natural and healthy part of living and advocates the right of individuals to make

responsible sexual choices. SIECUS provides information services to professionals, students, and members of the general public across the United States. SIECUS deplores any attempts to undermine women's reproductive health rights. The SIECUS Board of Directors has passed a position statement supporting the right to choose abortion, which states in part, "SIECUS believes a woman is entitled to have full knowledge of alternatives available to her and to have complete and unbiased information and counseling concerning the nature, the consequences, and the risks, both of the abortion procedure and of pregnancy and childbirth." SIECUS believes that the February 1988 regulations would deny women the right and the ability to make responsible choices.

The SOUTHERN CALIFORNIA WOMEN'S LAW CENTER was established in 1989 as the first Law Center in Southern California solely devoted to addressing the civil rights of women and girls. The Law Center has identified the following priorities of its work: reproductive rights, sex discrimination in employment, sex discrimination in education, family law, domestic violence and child care. The Law Center's primary efforts in addressing these priorities emphasize support and technical and legal assistance to legal services agencies, community based organizations, attorneys and policymakers.

The WISCONSIN NURSE PRACTITIONERS IN REPRODUCTIVE HEALTH ("W.N.P.R.H.") is a statewide nursing organization dedicated to providing quality reproductive health care. W.N.P.R.H. joins this brief as *amicus curiae* because it believes that responsible and healthful decision making is based on thorough education with respect to all options available to the health care consumer.

WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND ("WERLDEF") is a nonprofit California corporation primarily serving the greater Los Angeles community. Established in 1978, WERLDEF was organized to ensure that women will be treated equally under the law. WERLDEF achieves its goals by educating women about

their legal rights, and assisting them in vindicating those rights by providing access to the courts. WERLDEF often receives calls from pregnant women who cannot afford the cost of a private doctor but who require information regarding their full range of choices vis a vis their pregnancy/parenthood. It is WERLDEF's policy to refer these women to medical clinics where they can obtain thoroughly reliable and accurate medical information and attention.

The WOMEN'S LAW CENTER is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. Our organization believes the regulations at issue in *New York State v. Sullivan*, which would deny federal funding for family programs that provide abortion information, services or referral, pose a critical threat to the reproductive rights of women.

The WOMEN'S LAW PROJECT ("WLP") is a nonprofit law firm dedicated to advancing the status and opportunities of women. WLP believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion.

The WOMEN'S LEGAL DEFENSE FUND ("WLDF") is a tax-exempt nonprofit membership organization founded in 1971 to challenge sex-based discrimination and to advocate for women's rights in society. WLDF believes strongly that to participate fully and equally with men in society, all women must have the right to decide for themselves whether and when to carry their pregnancies to term.

The YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF U.S.A. ("YWCA"), a national membership organization whose mission is the empowerment of women and the elimination of racism, strongly supports reproductive freedom of choice. Because the Department of Health and Human Ser-

vices' regulations restrict that freedom, and run counter to First Amendment protection, the YWCA supports the position taken in this *amicus curiae* brief.